Supreme Court, U. S.
FILED
OCT 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73—1849

ALFRED J. HEMLOCK,

Petitioner,

v.

UNITED STATES OF AMERICA.

No. 73—1850

HARRY HOFFER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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The filing of this reply brief has been delayed because of the Solicitor General's failure to effect a timely filing of his opposition briefs. He has disregarded the time limits set both in Rule 24(1) and in the August 27, 1974 letter from the Clerk, which requested that responses be filed "on or before September 11, 1974".

The Government has thus impeded the right of these petitioners promptly to bring to this Court's attention new considerations vitally affecting the propriety of granting certiorari.[1]

I.

Should action here be withheld until the *Parness* case is reached?

Chief among the new factors here presented is the filing of a petition for certiorari in *Parness* v. *United States,* No. 74-274, on September 13, 1974. The Court may wish to consider withholding action on the instant petitions until it reaches the *Parness* petition, which raises in a most dramatic fashion one of the critical issues in the instant cases —i.e., whether the Second Circuit committed constitutional error when it sanctioned the jury's drawing of otherwise impermissible inferences simply because the petitioners had not taken the stand and presented a "credible exculpatory version" of the alleged crime.

In the *Parness* case, the Second Circuit quoted and relied upon that portion of the opinion below that articulates this strange new constitutional doctrine. The *Parness* petition not only raises this matter as a question presented but notes (pp. 33-34) that this doctrine appears to be an extension and a perversion of a concept created by this Court in *Holland* v. *United States,* 348 U.S. 121, 138-139 (1954), and *Yee Hem* v. *United States,* 268 U.S. 178, 185 (1925).

This is far from what the Solicitor General has described (br., p. 12) as a "passing comment by Judge Friendly." It is a ruling and a precedent, already used in *Parness,* that

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[1] In this reply brief, unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of the defendants' Joint Appendix in the Court of Appeals; references to "Pet." are to the Hemlock petition (No. 73—1849); and references to the Government's brief ("br.") are to its brief in opposition to the Hemlock and Hoffer petitions.

poses a serious threat to the right given a defendant not to have adverse inferences drawn against him by reason of his failure to testify in his own defense. It may be noted that, contrary to the Government's assertion (br., p. 11), the trial court here did not give any instructions with relation to petitioners' "right to remain silent without inferences being drawn from such silence." This problem obviously deserves review by this Court.

II.

The concurrent sentence doctrine is not a bar to this Court's consideration of any of the issues raised by petitioners.

Contrary to the Government's contention (br., p. 9), the concurrent sentence doctrine is not a bar to this court's consideration of the issue relating to 18 U.S.C. § 1342, the "fictitious name" statute.[2] Further, no claim is, or could be, advanced by the Government that that doctrine could possibly affect any of the other issues raised by petitioners.[3]

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[2] Petitioner Hemlock received concurrent sentences of four years each, and petitioner Hoffer concurrent sentences of two years each, on (a) Count 1 of the indictment, charging conspiracy, (b) Counts 2 through 5, charging substantive violations of 18 U.S.C. § 2314, and (c) Counts 6 and 7, charging substantive violations of 18 U.S.C. § 1342, the "fictitious name" statute. In addition, petitioners Hemlock and Hoffer each received separate sentences of one year each—to run concurrently with each other but consecutively to the other sentences—on Counts 12 and 13, charging substantive violations of the mail fraud statute, 18 U.S.C. § 1341. The trial court also imposed a fine of $10,000 on petitioner Hemlock, which, the court specifically recited, was *"to cover all counts"* (957a-958a; emphasis supplied).

[3] The issue relating to the mail fraud statute (Pet., pp. 19-21) bears directly on petitioners' convictions on Counts 12 and 13, on which they received separate sentences. The remaining issues, relating to the co-conspirators' declarations (Pet., pp. 8-12), the "harmless error" doctrine (*id.*, pp. 14-17), the effect of petitoners' failure to take the stand (*id.*, pp. 17-19), and the Bahamian bank secrecy statute (Frank Pet., pp. 16-19), affect petitioners' convictions on all the counts.

Thus, this Court has held that "there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." *Benton* v. *Maryland*, 395 U.S. 784, 791. All that was held in *Barnes* v. *United States*, 412 U.S. 837, 848, fn. 16, on which the Government relies, was that it is discretionary with this Court to decide whether to review a case involving concurrent sentences.

In any event, the fine of $10,000 which was imposed on petitioner Hemlock was, by its terms, based on all the counts of which he was convicted, including the two counts charging violations of § 1342, and it is sheer speculation for the Government to suggest (br., p. 9, fn. 3) that "there is little likelihood that the amount of the fine was affected by the Section 1342 convictions." Furthermore, the Court of Appeals itself did not regard the issue relating to § 1342 as barred by the concurrent sentence doctrine; indeed, that court expressly stated that if the interpretation of § 1342 urged by petitioners were accepted, "there would have to be a reversal not only of the convictions under Counts 6 and 7 [charging substantive violations of § 1342] but perhaps also of the conviction on the conspiracy charge, Count 1, since the [trial] judge instructed that a finding of a conspiracy to violate § 1342 would warrant a conviction on the conspiracy count" (Pet., App. A, p. 17a).

In attempting to support the expanded reading accorded to § 1342 by the Court of Appeals, the Government asserts (br., p. 9) that "nothing in the legislative history of the statute supports an opposing view." It is clear, however, that nothing in the legislative history of the statute supports the broad interpretation applied by the Court of Appeals; certainly, the legislative history of the statute, to which the Government briefly refers in its brief in opposition to the separate petitions filed herein by co-defendants Borgman and Frank (Nos. 73-1603, 73-1674), has no bearing whatever on the issue here presented. Clearly, in such circumstances, the settled canon is here applicable that "a

criminal statute . . . must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States* v. *Enmons,* 410 U.S. 396, 411.

III.

As to the Court of Appeals' extension of the Federal hearsay exception relating to co-conspirators' declarations.

In an evident attempt to avoid meeting the issue as to the validity of the Court of Appeals' extension of the Federal hearsay exception relating to co-conspirators' declarations (Pet., pp. 8-12), the Government (br., pp. 12-13) urges (a) that the issue was not properly preserved for review in the trial court, (b) that the co-conspirators' declarations here involved did not actually constitute hearsay, and (c) that, in any event, such declarations were "not a significant part of the case" against petitioners. There is no merit whatever to any of these contentions, and it is significant that the Court of Appeals in no way attempted to rest its decision on any such grounds and in fact squarely rejected the Government's contention that the issue had not been preserved for review.

As the Court of Appeals pointed out (Pet., App. A, p. 20(a), fn. 16), the trial judge had early in the trial "ruled that he would provisionally admit all declarations of alleged co-conspirators subject to a subsequent blanket motion to strike evidence the submission of which was not warranted under the conspiracy exception" (195a, 203a, 217a-218a, 519a, 566a), and such a motion to strike was made by each defendant at the close of the Government's case (727a).[4]

[4] It may be noted that at an early point in the trial, counsel for petitioner Hoffer made a request of the trial court—which under the court's "ground rules" enured to the benefit of the other defendants (134a)—for "a limiting instruction" with reference to testimony which would not be admissible against a particular defendant unless justified under the rules relating to conspiracy; that the trial court stated it would "indicate at the proper time to what references the jury's attention should be drawn and to whom they apply"; but that the court never did so (203a).

Contrary to the Government's assertion (br., pp. 12-13), the declarations made by co-defendants Frank and Borgman (also known as "Miller") at the meeting of September 24, 1968 were "introduced for the purpose of proving facts contained in, or asserted by, those statements" and were consequently hearsay. See *United States* v. *Williamson*, 450 F.2d 585, 589 (5th Cir.), cert. den. 405 U.S. 1026 (cited by the Government). As a matter of fact, such declarations constituted the only direct evidence binding on any of the defendants to show the excessiveness of the prices paid by Planinvest to the Bahamian corporations, Columbia and Splindian, for the two parcels of Canadian real property here involved.

Thus, while there was evidence to show the prices paid to the original sellers by the intermediate purchasers, Kay and Miss Comeau, for such properties, there was no evidence to show how much was paid by Columbia to Kay for the parcel involved in the first transaction, or by Splindian to Miss Comeau for the parcel involved in the second transaction (See Pet., p. 6). Furthermore, there was otherwise no evidence as to the values of the two parcels of land involved, nor any expert testimony thereon. Nor was there any evidence to show that petitioners Hemlock or Hoffer had any knowledge of the prices paid to the original sellers (Pet., p. 6).

The admissions made by Frank and Borgman as to the excessiveness of the prices paid by Planinvest, coupled with their bizarre explanation as to the use made of the money "to pay off the CIA", constituted highly damaging evidence which must surely have prejudiced petitioners Hemlock and Hoffer in the minds of the jury in view of the absence of any limiting instructions. It may be noted in this connection that all the activities which the Government notes (br., p. 13), were shown to have been engaged in by Hemlock and Hoffer, were fully consistent with

their having acted merely in their capacity as attorneys (see Pet., p. 17).

The additional arguments advanced by the Government (br., pp. 13-14) are fully answered in the petitions herein (Hemlock Pet., pp. 8-12; Hoffer Pet., pp. 10-11). It may be noted that there is not an iota of evidence in the record—*and none is cited by the Government*—to support its contention (br., p. 13) that "the conspiracy was still in effect after the two real estate transactions had been consummated, since there was evidence of a willingness to make further fraudulent deals if the opportunity presented itself" (see Hemlock Pet., p. 11, fn. 6).

In a further spurious effort to show that the conspiracy was still continuing on September 24, 1968, when Frank and Borgman made the declarations here involved, the Government (br., pp. 13-14), attempts to give the erroneous impression that the cash withdrawals from the time deposits in the Columbia and Splindian bank accounts in Nassau were made at or about the same time. The evidence, however, showed that the time deposits were opened in about January or February 1968 and that the cash withdrawals were made therefrom within a period of 30 to 60 days thereafter; i.e., no later than March or April 1968, more than five months prior to the meeting of September 24, 1968 (637a-642a).

It is immaterial that Frank's purpose might have been "to protect the success of the fraud", as asserted by the Government (br., p. 14), or to forestall any civil suit by Mrs. Dominguez, as asserted by the Court of Appeals (Pet., App. A, pp. 20a-21a). As pointed out in the Hemlock petition (pp. 11-12), any efforts on the part of the conspirators to retain the fruits of their crime or to forestall a civil suit by the victim, would be the equivalent of nothing more than a purpose to "conceal" or "cover up" their crime, such as was involved in *Krulewitch* v. *United*

States, 336 U.S. 440, 443-5, and *Grunewald* v. *United States*, 353 U.S. 391, 399-402.

Cases on which the Government relies, such as *United States* v. *DeSapio*, 435 F.2d 272, 284 (2d Cir.), cert. den. 402 U.S. 999, are clearly distinguishable. Thus, in *DeSapio*, the court emphasized that the purpose of the declarant co-conspirator was, not "to conceal facts in order to prevent detection, conviction and punishment", but rather to attempt to achieve some remaining affirmative objectives of the conspiracy (435 F.2d at 284). No such situation is here presented.

IV.

As to the other issues.

(a) As to the "harmless error" doctrine.

The Government (br., pp. 14-16) makes no effort to meet the issue raised by petitioners (Pet., pp. 14-17) as to whether there is any warrant for applying different standards of harmless error on the basis of whether the error affects constitutional rights.

The Government (br., p. 16) apparently suggests that petitioners are in no position to complain of the errors committed by the trial court since they did not "offer a written version of the instruction they would have preferred (Rule 30, Fed. R. Crim. P.)". That suggestion, however, is wholly without merit. The Court of Appeals itself pointed out in its opinion that the issue as to whether a conviction in the criminal case would be entitled to collateral estoppel effect in Mrs. Dominguez' civil action, was properly raised in the trial court, not only by objections to the trial judge's charge but also by defense counsel's

request for an instruction on the subject (see Pet., p. 14; *id.*, App. A, pp. 28a-29a).[5]

There is likewise no merit to the Government's claim (br., p. 16) that "the instructional error was harmless even by the stricter *Chapman* standard." (See Pet., p. 15, fn. 9).

(b) As to the standards applicable under the mail fraud statute, 18 U.S.C. § 1341.

The Government (br., p. 10; see also br. op. Borgman-Frank petitions, pp. 12-13) attempts to distinguish *United States* v. *Maze*, 414 U.S. 395, on the ground that the two real estate transactions here involved necessarily remained incomplete until the Canadian notary, Solomon, had sufficient documentary evidence to be satisfied that Mrs. Dominguez' Luxembourg corporation, Planinvest, was "empowered to buy and hold real estate."

The evidence, however, undisputedly shows that Solomon proceeded with the closing of the first transaction, even to the point of filing the pertinent documents in the Montreal registry office, without waiting to receive any of the papers which Hoffer promised to send him (Pet., p. 19). Similarly, even though Solomon never received the information relating to Planinvest's power to own real estate, for which he

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[5] As a matter of fact, as was pointed out in petitioners' joint petition for rehearing in the Court of Appeals (pp. 4-5), the Government's requested instructions on the issue of collateral estoppel, which were adopted practically verbatim by the trial court in its main charge, were embodied in supplemental requests to charge which were not served on defense counsel until the morning of the day on which the trial judge delivered his charge to the jury, and no opportunity was afforded to defense counsel to voice any objections thereto until the trial court delivered its charge adopting the Government's supplemental requests. Indeed, as the Court of Appeals itself pointed out (Pet., App. A, p. 32a), it was not necessary at all for the trial court to charge on the matter here involved. It was only the Government that requested such a charge, and defense counsel could not be certain until the actual charge that there would be any instructions on the subject.

wrote to Hoffer on January 30, 1968, Solomon nevertheless proceeded with the consummation of the second transaction in Nassau on February 5, 1968 (Pet., pp. 19-20).

(c) As to the Bahamian bank secrecy statute.

In its brief herein (pp. 10-11), as well as in its brief in opposition to the Borgman and Frank petitions (p. 17), the Government urges that the individual petitioners have no standing to raise the issue relating to the Bahamian bank secrecy statute since the Bahamian bank accounts here involved were opened by petitioners Hemlock and Hoffer in the names of the two Bahamian corporations, Columbia and Spindian. It is submitted, however, that the individual petitioners do have such standing, particularly since the Government has here urged that the two Bahamian corporations were actually petitioners' *alter egos*. In any event, the Government has in no way shown that the issue raised by petitioners is not an important one worthy of review by this Court, and its injection of the issue of standing merely serves to present an additional important and novel question for this Court's consideration.

CONCLUSION

For the reasons set forth in the petitions herein and in this reply brief, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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